

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1339

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P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1339

UNITED STATES OF AMERICA

APPELLEE

V.

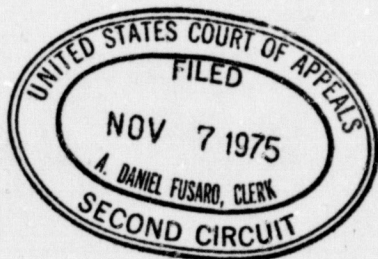
JAMES PORCELL OLIVER

APPELLANT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF IN SUPPORT OF
MOTION TO WITHDRAW

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STATUTES INVOLVED

Title 26, United States Code, Section 5861:

§ 5861. Prohibited acts

It shall be unlawful for any person---

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

Title 26, United States Code, Section 5845:

§ 5845. Definitions

For the purpose of this chapter---

(a) Firearm--The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device)

which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Title 18, United States Code, Section 844:

§ 844. Penalties

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of an explosive shall be imprisoned for not more than five years or fined not more than \$5,000, or both.

STATEMENT OF THE CASE

On November 15, 1974 James Purcell Oliver was charged in a three count indictment (Appendix at 3-4) with the following: Count One -- with possessing an unregistered firearm, that is a "molotov cocktail," in violation of Title 26, United States Code, Sections 5861(d), 5845(a), and 5871; Count Two -- with wilfully making a threat to kill, injure or intimidate Lillie M. Jenkins after an unsuccessful firebombing of her home by means of a telephone in violation of Title 18, United States Code, Section 844(e); and Count Three -- with wilfully making a threat to unlawfully damage and destroy a building by means of an explosive over the telephone in violation of Title 18, United States Code, Section 844(e).

On June 19, 1975 the jury trial commenced against James Oliver and on June 20, 1975 he was convicted on all three counts as charged.

The Court sentenced Oliver to five years imprisonment on each of the three counts, the sentences to run concurrently, on September 15, 1975.

A timely notice of Appeal was filed on September 17, 1975 (Appendix at 2).

QUESTION PRESENTED

Are there any non-frivolous issues to be raised on appeal on behalf of the appellant?

THE FACTS OF THE CASE

The defendant did not testify at the trial. The defendant's defense was basically an attack on the strength of the government's case, especially the ability of the witnesses to make an eyewitness identification. An alibi defense was not presented.

The following recital of the facts of the case, or more accurately, the facts of the alleged offense, are derived from the government's witnesses. The defense only presented one witness, Robert E. Porter, who briefly testified as to his interview with the investigating police officer, Mrs. Ascuncion T. McQueeney, and the distance he found to be between the building in which the alleged victim lived and the playground in which the defendant was alleged to have been seen after running from the scene of the crime.

Lillie Mae Jenkins was the key government witness (her entire trial testimony is included in Appendix, pages 7-47).

She testified that she and the defendant had known each other for approximately seven years and that they had dated in the years 1971-1974. Some time in the spring of 1974 Ms. Jenkins stated she terminated their relationship.

On July 14, 1974 Lillie Mae Jenkins was living at 20 Capen Street in Hartford, Connecticut, on the second floor of a single dwelling used for apartments, with her mother, Mrs. Katherine Marshall; her brother, Steven Marshall; and her 5-year-old sister, Robin Marshall.

Some time in the evening of July 14, 1974 Ms. Jenkins claimed that Oliver visited her home and argued with her about a television set he had once given her. Ms. Jenkins said she gave Oliver the TV set and then heard him smash the set on the street in front of her house. She testified that from the second floor front porch she heard him state "I'll get you Cookie" as he went off screaming (Appendix at 11-13). Mrs. Marshall also testified that she heard the defendant make this threat as she was sitting on her front porch.

Later that same night at approximately 10:00 p.m., Ms. Jenkins testified that she saw Oliver walk past her house on the opposite side of the street with two bottles under his arm (Appendix at 31). Ms. Jenkins was sitting alone on the porch when she saw him, and even though she did not know if he saw her, she testified she heard him mumble "I'm going to burn the house down" (Appendix at 32).

Later on that evening Ms. Jenkins claimed Oliver called her home and asked to speak with her. Although she refused to speak with him and her mother answered the telephone, she claimed she listened to the telephone conversations on one of the three telephone extensions in the apartment (Appendix at 36).

At approximately two o'clock in the morning Ms. Jenkins testified she was awakened by a crash through her window. The fact that she was soundly asleep was partly discredited by Mrs. Marshall's testimony that she talked to her daughter at 1:50 a.m. about one of the telephone calls (Appendix at 53).

Ms. Jenkins testified that when her window was broken she smelled gasoline, "jumped up and looked out the window," and saw James Oliver in the reflection of a window in an adjacent building running down the driveway (Appendix at 14-18).

Ms. Jenkins testified that shen then ran to a kitchen window on the opposite side of the apartment where she and her mother saw Oliver crossing a vacant lot to a basketball court (see Mrs. Marshall's testimony, Appendix at 54). All of this supposedly took place within 15 seconds (Appendix 17).

Ms. Jenkins admitted on cross-examination that she was frightened and excited; however, she claimed that it was easy to see that night and that street lights and bright lights in the playground assisted her. Mrs. Marshall also testified that these lights were on and that it was a clear night. Officer McQueeney, the investigating police officer, who arrived shortly after this incident testified that it was a dark, rainy night but that street lights were on (Appendix at 76a). The sole defense witness testified that the distance from the building at 20 Capen Street to the basketball court where the defendant was seen was 192 yards (Appendix at 77-78).

Shortly after Officer McQueeney arrived at 20 Capen Street the telephone rang. Ms. Jenkins testified that she answered the telephone and that she could identify the voice as James Oliver's. She said he told her "I'll get you; I missed you this time, but I'll get you the next time." (Appendix at 18). The caller evidently referred to her as "Cookie," which is Ms. Jenkins' nickname. Because there were three telephone extensions, Officer

McQueeney and Mrs. Marshall also listened to this conversation at Ms. Jenkins' request. Their recollections did not differ from that of Ms. Jenkins (Appendix at 42-43 and 75).

Steven Marshall, Ms. Jenkins' 18-year-old brother, testified that after Officer McQueeney had departed that he answered another telephone call. He identified the voice as that of James Oliver, who he had known for some time. He testified that the caller told him to "leave the house in two minutes, or I'm going to blow it up" (Appendix at 71).

Ms. Jenkins also testified that following July 15, 1974 James Oliver called her a number of times and told her not to testify or to press charges (Appendix at 21). On one occasion she stated he threatened to get her if she testified (Appendix at 21).

The testimony offered by the government through its various witnesses, with the exception of a few small facts, was consistent and not contradictory.

INTRODUCTION

The appellant's court-appointed attorney, Charles N. Sturtevant, has moved to withdraw as counsel for the indigent appellant as he believes, after making a conscientious examination of the record and transcript of the trial, that there are no non-frivolous issues to be raised and pursued. This brief is submitted, therefore, pursuant to the requirements of Anders v. California, 386 U.S. 738 (1967). See also United States ex rel. Banks v. Henderson, 514 F.2d 1000 (2d Cir. 1975).

ARGUMENT

1. CITATION OF THE WRONG SECTION OF THE PENAL CODE IN COUNTS TWO AND THREE OF THE INDICTMENT DID NOT PREJUDICE THE APPELLANT.

Counts two and three of the indictment in Criminal No. H-74-174 (Appendix 3-4) cite Section 644(e) of Title 18 as the violation charged when, in fact, Section 844(e) should have been cited.

There is no Section 644(e) in Title 18 of the United States Code. This section is part of Chapter 31 which deals with "Embezzlement and Theft." Section 844, on the other hand, is part of Chapter 40 which pertains to "Importation, Manufacture, Distribution and Storage of Explosive Materials." The language in counts two and three is quoted almost verbatim from 18 USC § 844(e).

When the defendant pled not guilty the section for counts two and three was read as § 644(e) and not § 844(e) (Appendix at 5). However, there has never been a claim by the defendant or his attorney that the indictment did not properly apprise him of the charge he was alleged to have committed. Recently in United States v. Rivera, 513 F.2d 519, 533 (2d Cir. 1975), Judge Friendly noted that "It is settled law that citation of a wrong section of the penal code, not going to the substance of the crime charged, is not grounds for dismissal of an indictment, at least where the defendant has not been misled to his prejudice."

At the beginning of the trial, the prosecutor alerted the Court as to this typographical error (Appendix at 6). The attorney for the defendant acknowledged that he had been aware of this error and that he had agreed to stipulate that the correct section was 844(e). It should be noted that the defendant had been released on his own recognizance awaiting trial and that a period of six months had elapsed between the return of the indictment and the commencement of the trial.

Indictments are generally judged by practical and not technical considerations. In reading the language of counts two and three, it cannot be realistically argued that the language did not adequately and fairly inform the defendant of the charges he was facing. See Willis v. United States, 289 F.2d 581, 584 (8th Cir. 1961), and United States v. Cook, 412 F.2d 293, 296 (3d Cir. 1969).

2. THE EVIDENCE WAS SUFFICIENT FOR
CONVICTION ON ALL THREE COUNTS.

The evidence on appeal must be viewed in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942), United States v. Koss, 506 F.2d 1103, 1106 (2d Cir. 1974), and United States v. Johnson, 513 F.2d 819, 821 (2d Cir. 1975). Taking into consideration the evidence presented by the defense, United States v. Johnson, supra at 821, and United States v. Tramunti, 500 F.2d 1334, 1338 (2d Cir. 1974), the jury could have found facts (see Statement of the Facts) supporting verdicts of guilty on each of the three counts.

The defense offered no theory of defense. The only real issues for the jury were the credibility of the government's witnesses, especially their ability to identify the defendant personally for purposes of count one and their ability to identify his voice for counts two and three.

COUNT ONE

The Government had to prove four essential elements beyond a reasonable doubt in order to establish beyond a reasonable doubt the offense of possession of an unregistered firearm charged in count one. First, that the object in question was designed or intended for use as a destructive device, as defined in the National Firearms Act; second, that the destructive device had not been registered to the defendant in the National Firearms Registration and Transfer Record; third, that the destructive device or incendiary bomb was possessed by the

defendant; and fourth, that the defendant's possession was knowing and willful, and for an unlawful purpose.

The only true defense or question raised by the defendant was that the identification of the defendant as perpetrator of the crime was not reliable. While the Court did not give the charge requested by the defendant on the dangers of eyewitness identification (Appendix at 82), the other portion of the defendant's charge on identification was practically adopted verbatim (compare Charge Appendix at 151-152 with Request Appendix at 80-81).

Taken as a whole the charge was fair and adequately instructed the jury on the identification question. In addition, it would seem that denial of an instruction on the fallibility of eyewitness identification is a matter of discretion with the Court, United States v. Evans, 484 F.2d 1178, 1187-1188 (2d Cir. 1973), and not grounds for error in this case.

Similarly the Court adopted verbatim most of the Defendant's Requests for Charge concerning Credibility of Witnesses (compare Court's Charge Appendix at 152-154 with the Request To Charge Appendix at 83). The charge appears to be clear and thorough.

In conclusion, the issue of identification appears to have been properly and adequately put before the jury and that the evidence was sufficient to justify the jury's verdict.

COUNTS TWO AND THREE

The Government had to prove the same three essential elements in counts two and three. First, that on or about the date set forth in the indictment, that the defendant made a threat to kill, injury or intimidate Lillie Mae Jenkins by means of an explosive; second, that the threat was communicated by means of a telephone; and third, that the act or acts were done willfully and knowingly. The only difference between counts two and three is that the Government had to prove that the threat in count three was directed at 20 Capen Street and not a person.

Voice identification is both a sanctioned and recognized means of identification and, as such, is admissible. United States v. Moia, 251 F.2d 255, 257 (2d Cir. 1958). See also United States v. Cox, 449 F.2d 679, 690 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972); United States v. Romano, 482 F.2d 1183, 1194 (5th Cir. 1973); and United States v. Whitaker, 372 F. Supp. 154, 164 (M.D. Pa. 1974). In this case, there was ample foundation for the voice identifications made by Lillie Mae Jenkins, Mrs. Marshall, and Steven Marshall as each testified they had known the defendant for some time (see respectively, Appendix at 9-10, 49-50, 67-68). Any question as to the degree of the witnesses' familiarity with the defendant's voice and his or her ability to make an identification is a question of reliability and what weight the jury wishes to give the evidence, and not a question of the admissibility of such evidence.

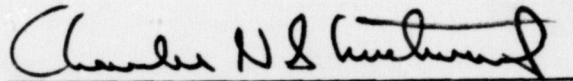
It is apparent from the defendant's conviction that the jury believed the government's witnesses and that sufficient evidence was presented to justify the jury's verdict on these two counts.

CONCLUSION

Based on the foregoing it is respectfully requested that the court-appointed attorney for the appellant be allowed to withdraw as there are no non-frivolous issues to pursue on appeal.

Dated at Hartford, Connecticut, this 6 day of November, 1975.

Respectfully submitted,

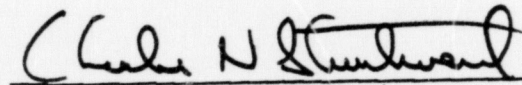


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Attorney for Appellant

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, to Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, and to Mr. James Purcell Oliver, Federal Correctional Institution, Danbury, Connecticut 06810, this 6 day of November, 1975.


Charles N. Sturtevant

